SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 169

RICHARD W. LEOPOLD,

vs.

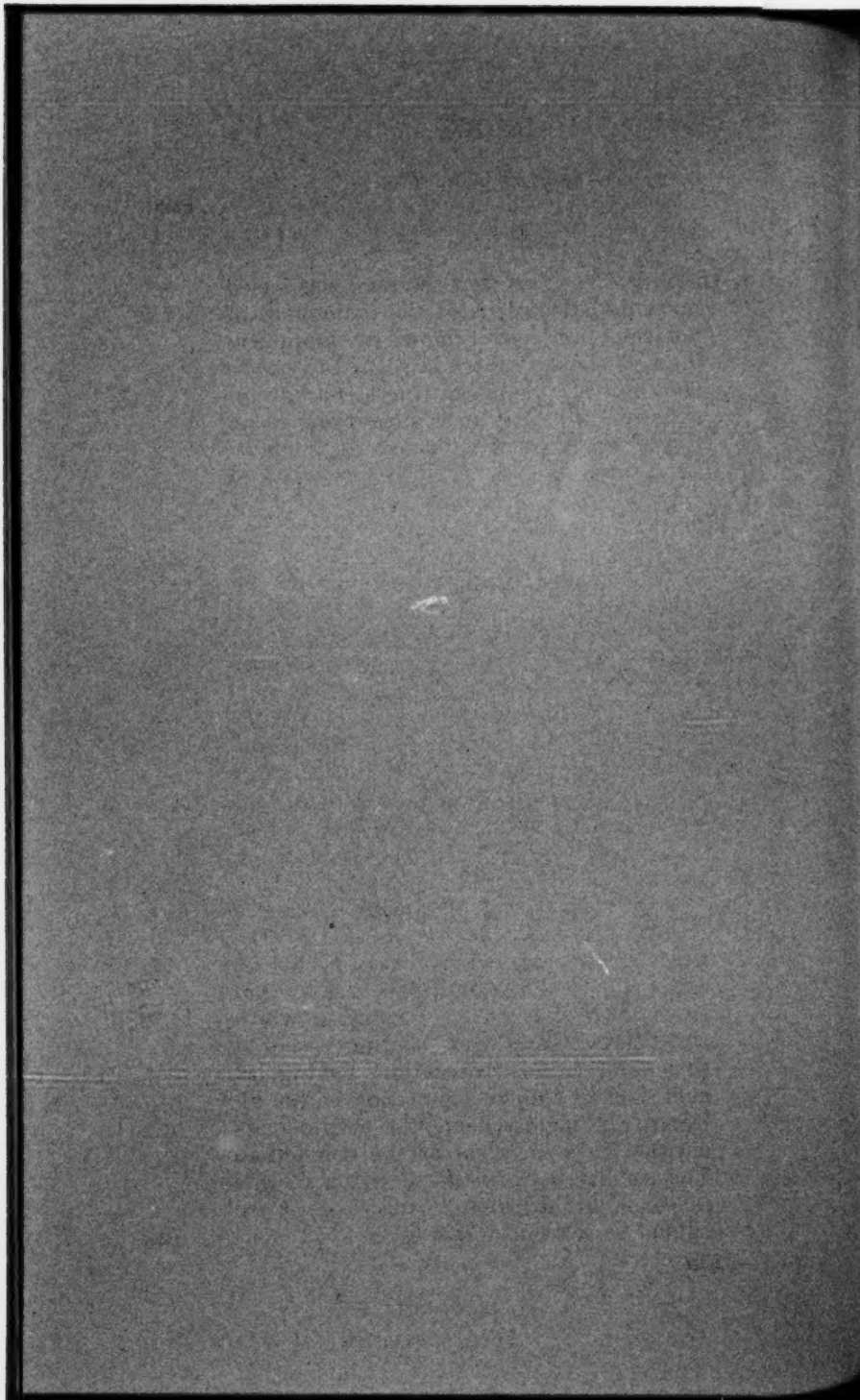
THE UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF PETITION FOR CERTIORARI.

William W. Lancaster, Jr.,

Owen C. Scarborough,

Counsel for Petitioner.



INDEX.

Table of Contents.

	Page
Petition	1
Summary of argument	3
I. In view of the fact that the trial was based upon the allegations of the indictment of non-compliance with the wholly inapplicable Louisiana statutes in regard to public bidding, the rule permitting a court to instruct a jury that such allegations in an indictment may be treated as surplusage is not applicable. The prejudice to the petitioner cannot be eradicated by a mere instruction to disregard such allegations	4
II. Cross-examination of petitioner as to private business transactions in which he made personal profits and the subsequent examination of the witness Hill, who refused to answer on the ground of self-incrimination, and the reference to this subject in the summing up by the prosecution and the charge of the judge on this subject, were so prejudicial as to render the trial wholly unfair; the mere fact that no objection was taken to said cross-examination is immaterial	8
III. Under the authority of *Stapp* v. *United States,* 120 F. (2d) 898, decided by the Circuit Court of Appeals for the Fifth Circuit, after the decision in this case by that same court, the use of the mails, which constitutes the alleged mailing essential to a mail fraud prosecution, having occurred after the consummation of the alleged fraudulent scheme, the petitioner is entitled to a reversal of the conviction. The conflict between the decision in this case and the decision in the *Stapp* Case should be settled by this Court	12

Page

IV. The draft of $22,000 in favor of Thomas, drawn by the Younger Motor Truck Corporation, representing a part of the profits under the alleged scheme to defraud, having been deposited in the City National Bank of Baton Rouge, and thereafter sent by that bank to a third bank and then allegedly mailed by this third bank to still another bank, not named in the draft, such incidental use of the mails is not "caused" by the defendant nor "according to the direction thereon" and does not come within the mail fraud statute 20

Conclusion 21

Certificate of counsel 22

TABLE OF CASES CITED.

Burton v. *United States*, 196 U. S. 283 20

City of Douglas v. *Federal Reserve Bank*, 271 U. S. 489 20

Crawford v. *United States*, 212 U. S. 183 2

Daykin v. *Bayly*, 290 U. S. 143 20

Dyhre v. *Hudspeth*, 106 F. (2d) 286 18

Frank v. *Mangum*, 237 U. S. 309 2

Holt v. *United States*, 94 F. (2d) 90 6

McNear v. *United States*, 60 F. (2d) 861 18

Meyer v. *United States*, 220 Fed. 800 18

Mitchell v. *United States*, 118 F. (2d) 653 18

New York Cent. R. Co. v. *Johnson*, 279 U. S. 310 11

Niederluecke v. *United States*, 21 F. (2d) 511 9

Patterson v. *State of Alabama*, 294 U. S. 600 11

Stapp v. *United States*, 120 F. (2d) 898 3

State of Iowa v. *Hinshaw*, 197 Ia. 1265, 1272 9

STATUTES CITED.

Dart's Louisiana General Statutes, Volume 1, § 846 18

18 U. S. Code, § 338 21

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 169

RICHARD W. LECHE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF PETITION FOR CERTIORARI.

Comes now the above-named Richard W. Leche and presents this, his petition for rehearing of his petition for certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, which petition was denied on October 13, 1941.

The petitioner heretofore filed his petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered March 13, 1941, affirming a judgment of conviction for using the mails in furtherance of an alleged scheme to defraud.

Petitioner verily believes that there are certain grounds of review which have not heretofore been presented to this Court.

Petitioner believes that the Circuit Court of Appeals has sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision and, as further appears, has decided an important question of Federal law, which has not been, but should be, settled by this Court.

In view of his belief in his own innocence and the severity of the sentence, petitioner respectfully asks the court to give renewed consideration to the petition for certiorari and grant petitioner merely the right to fully argue and present his case to this Court. More especially does he respectfully pray for such consideration in view of the fact that his conviction was based upon an issue of fact between one sole witness, Thomas, and petitioner. Thomas, who was granted immunity, testified to paying $31,000 cash to your petitioner, which petitioner (R. 613, 614) on the witness stand sharply denied, Thomas' testimony on this issue being wholly without corroboration, documentary or otherwise. Thomas also (R. 484) repaid the entire $53,000 to the Highway Commission before trial of this case.

In view of the fact that pleas of guilty to the indictment were entered by the other two co-defendants, who were merely fined (R. 68), and in view of the fact that the aforesaid witness, Thomas (R. 1-16), was not even indicted, the rule in the case of *Crawford* v. *United States*, 212 U. S. 183, 204, becomes particularly applicable, that in cases like this the greatest care should be taken to prevent injustice, especially in view of the fact that a "tremendous political upheaval took place in the State" (R. 179).

A reading of the record herein impresses one with the fact that the situation before the Court here was similar to that in *Frank* v. *Mangum*, 237 U. S. 309, where Justice Holmes said (p. 349):

> "Any judge who has sat with juries knows that, in spite of forms, they are extremely likely to be impregnated by the environing atmosphere."

The record herein presents a total lack of judicial atmosphere, evidenced, for example, by the fact that three prosecutors summed up for the Government, whose summing up were appeals to prejudice and passion and not to the calm judgment of a local jury (R. 733, 735, 736, 738, 739).

Summary of Argument.

I. In view of the fact that the trial was based upon the allegations of the indictment of non-compliance with the wholly inapplicable Louisiana statutes in regard to public bidding, the rule permitting a court to instruct a jury that such allegations in an indictment may be treated as surplusage is not applicable. The prejudice to the petitioner cannot be eradicated by a mere instruction to disregard such allegations.

II. Cross-examination of petitioner as to private business transactions in which he made personal profits and the subsequent examination of the witness Hill, who refused to answer on the ground of self-incrimination and the reference to this subject in the summing up by the prosecution and the charge of the Judge on this subject, were so prejudicial as to render the trial wholly unfair; the mere fact that no objection was taken to said cross-examination is immaterial.

III. Under the authority of *Stapp* v. *United States*, 120 F. (2d) 898, decided by the Circuit Court of Appeals for the Fifth Circuit, after the decision in this case by that same court, the use of the mails, which constitutes the alleged mailing essential to a mail fraud prosecution, having occurred after the consummation of the alleged fraudu-

lent scheme, the petitioner is entitled to a reversal of the conviction. The conflict between the decision in this case and the decision in the *Stapp* case should be settled by this Court.

IV. The draft of $22,000 in favor of Thomas, drawn by the Younger Motor Truck Corporation, representing a part of the profits under the alleged scheme to defraud, having been deposited in the City National Bank of Baton Rouge, and thereafter sent by that bank to a third bank and then allegedly mailed by this third bank to still another bank, not named in the draft, such incidental use of the mails is not "caused" by the defendant nor "according to the direction thereon" and does not come within the mail fraud statute.

I.

In view of the fact that the trial was based upon the allegations of the indictment of non-compliance with the wholly inapplicable Louisiana Statutes in regard to public bidding, the rule permitting a court to instruct a jury that such allegations in an indictment may be treated as surplusage is not applicable. The prejudice to the petitioner cannot be eradicated by a mere instruction to disregard such allegations.

The indictment herein contained allegations that a part of the scheme was that the defendants failed and refused to comply with the law of the State of Louisiana requiring all political subdivisions of the State to advertise for bids before the purchase of materials and supplies in excess of $500. In fact, the only duty charged to petitioner and the only two false representations alleged in the indictment are founded squarely upon the alleged violation of this penal statute. The District Court instructed the jury that "this particular statute", "apparently relied

upon" (R. 767), was questionable and to "put that statute aside", and "not consider it here", and (R. 780) "although there is mention of it in the indictment", "you should disregard that as surplusage."

The Circuit Court of Appeals ruled that there was no error committed by the trial court in eliminating consideration of the statute, because the averment as to the requirement under the State law was wholly immaterial and unnecessary.

Assuming the allegation of non-compliance with the said State law was unnecessary, petitioner now alleges that an examination of the record reveals that its elimination from consideration of the jury did not take place until the court charged the jury (R. 761).

That the indictment was based largely upon alleged non-compliance with the Louisiana statute and the trial based largely upon such non-compliance, becomes evident from an examination of the opinion overruling the demurrer (R. 48), the statement of the court as to its understanding of the contention of the Government as made in the indictment and in its opening statement (R. 172), the statement of the prosecutor (R. 173), and the statements of the Government's counsel in summation, commenting on petitioner's failure to do his public duty and advertise for bids (R. 700, 702, 703).

Furthermore, when the witness Thomas was called to the stand (R. 394), the prosecution read the Louisiana General Statute concerning public bidding on contracts of purchase in connection with public works. This was objected to by counsel for the defense and then all stricken out, the court not denying the applicability of the statute, but merely stating that the proper way to have the law presented to the jury is through the request for instructions (R. 397), all this further tending to impress on the minds of the jury the importance of the statute.

While it is true that in a criminal trial immaterial parts of an indictment may be disregarded and the jury directed to so disregard such parts of the indictment, still this rule with regard to surplusage should not be held to apply when the alleged superfluous parts of the indictment are the subject of constant reference during the trial and the jury are necessarily impressed with the lack of performance of an alleged duty which does not exist. The prosecuting attorney (R. 173) in his opening remarks specified that the violation of this alleged Louisiana Law was the basis of the indictment herein (R. 172), and this was corroborated by the statement of the court.

In such a situation, the rights of the defendant are prejudiced. The mind of the jury becomes permeated with the evidence introduced in connection with the parts of the indictment which the jury are afterwards told should be disregarded, and the rule that an instruction by a court to a jury to disregard evidence, after the court allows it in, and damage done, does not cure the error of the admission of such evidence, becomes applicable.

Holt v. *United States,* 94 F. (2d) 90, 94, and cases cited therein.

In that case, a dying declaration was erroneously allowed in evidence. The court said:

> "However, where the character of the evidence is such that it is likely to create so strong an impression on the minds of the jurors to the prejudice of the defendant, that they will be unable to cast it aside in the consideration of the case, a mistrial should be ordered. (*Throckmorton* v. *Holt,* 180 U. S. 552, 567; *Waldron* v. *Waldron,* 156 U. S. 361, 383; *Armour & Co.* v. *Kollmeyer,* 161 F. 78, 83; *Looker* v. *United States,* 240 F. 932, 935; *Maytag* v. *Cummins,* 260 F. 74, 80; *Boyd* v. *United States,* 142 U. S. 450, 458; *Lockhart* v. *United*

States, 35 F. (2d) 905, 906; *C. M. Spring Drug Co.* v. *United States,* 12 F. (2d) 852, 858; *Patterson* v. *State,* 23 Ala. App. 428; *People* v. *McKelvey,* 85 Cal. App. 679; *Hartman* v. *State,* 121 Fla. 627; *Young* v. *Commonwealth,* 220 Ky. 59; *Borders* v. *Commonwealth,* 252 Ky. 577; *Warren* v. *State,* 174 Miss. 63; *Quinn* v. *State,* 54 Okl. Cr. 179; *Stafford* v. *State,* 125 Tex. Cr. R. 174.)"

"The statement purported to be a dying declaration. It was a full and complete narrative of what occurred between Alexander and his alleged coconspirators from the beginning. It was before the jury from early in the trial until the close of the evidence. It must have made a deep and lasting impression on the minds of the jurors. It squarely contradicted Holt's defense that he did not know Alexander was an imposter, while the competent evidence on that issue was far from conclusive.

"We doubt that it was possible for the jury to efface the statement from their minds and to consider the case solely on the competent evidence adduced. In fact, we find it difficult so to do.

"We are of the opinion that the instruction of the court to the jury to disregard the statement did not cure the error in its admission, and that the motion for a mistrial should have been granted."

Here the Louisiana bidding statute "was before the jury from early in the trial until the close of the evidence" and "must have made a deep and lasting impression on the minds of the jurors" and, certainly, in the present case it was not possible for "the jury to efface" the bidding statute "from their minds", and the instruction "to disregard" the statute as surplusage did not cure this.

II.

Cross-examination of petitioner as to private business transactions in which he made personal profits and the subsequent examination of the Witness Hill, who refused to answer on the ground of self-incrimination, and the reference to this subject in the summing up by the prosecution and the charge of the judge on this subject, were so prejudicial as to render the trial wholly unfair; the mere fact that no objection was taken to said cross-examination is immaterial.

Another reversible error committed on the trial were the questions on cross-examination of the defendant as to other acts of the defendant, which were totally irrelevant. Notwithstanding that the Judge at the outset of the trial ruled (R. 608, 609) that the defendant's other business transactions were not relevant to the crime charged, the defendant was asked on cross-examination whether he received any commissions (R. 620) on any transactions while Governor of the State, and these transactions were the subject of lengthy interrogation. One was a transaction with the East Texas Refining Company; another, gas contracts that Feazel had with the United Gas Company. These contracts were wholly legitimate private affairs (R. 665; see assignment of error, R. 1058, 1059) and had nothing to do with the State of Louisiana or any other public body. True, the defendant had put no money in these deals, but commissions are made every day by persons who invest no capital, and these transactions do not bear the slightest resemblance to the transactions which were the subject of the indictment in any way whatsoever.

A public officer can properly earn profits in private business affairs. He is not forbidden to make investments or earn money or receive profits in independent business.

In *State of Iowa* v. *Hinshaw,* 197 Ia. 1265, 1272, the court said:

> "A public officer is not required to give every instant of his time to the public service in such a sense that he cannot, if wholly consistent with public duties, perform any other service or earn money from any other source. His first and paramount duty is to perform all of the requirements of his office; but he is not barred, because he holds public office, from investing his funds in a legitimate business enterprise, nor prohibited from receiving profits from an independent business in which he may have an interest."

In order that these transactions, brought out on cross-examination, should be admissible, they at least should have had some relevancy. They are totally remote and do not come within the category of admissible similar transactions.

The prejudice to the defendant of admitting reference to these private affairs appears from the fact that the Judge not only referred to the subject in his charge (R. 772), the prosecution (R. 721, 722, 725, 726, 727, 744) referred to it in its summing up, but the Judge based his sentence largely on these other alleged wrongful acts on the part of the defendant.

The witness Hill was examined by the prosecution on these private business deals. He refused to answer (R. 689) on the ground that the answers would tend to incriminate him. Subsequently, the prosecution utilized this refusal on the part of Hill as a ground for asserting that these business deals on the part of the petitioner must have been illegal (R. 721, 722).

While the rule in the Federal courts is very broad in permitting evidence of similar acts, nevertheless the rule has certain limitations, as appears in the case of *Niederluecke* v. *United States,* 21 F. (2d) 511, 513, where the Court, quoting

from 8 Ruling Case Law, p. 206, § 200, states the law as follows:

> " 'Whatever may be the object of evidence as to other offenses—whether to prove motive, intent or guilty knowledge, or to show a general plan or scheme, or to prove identity, or to establish sexual intimacy and opportunity—proof of a distinct substantive crime is never admissible unless there is some logical connection between the two, from which it can be said the one tends to establish the other. Without this obvious connection, it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury. The most guilty criminal may be innocent of other offenses charged against him, of which, if fairly tried, he might acquit himself. From the nature and prejudicial character of such evidence, it is obvious it should not be received, unless the mind plainly perceives that the commission of the one tends, by a visible connection, to prove the commission of the other by the prisoner.' "

In his charge to the jury, the trial judge said this evidence was admissible

> "as bearing upon the probability of whether or not he did, as some of the evidence tends to show, in effect take charge of the purchase of these trucks and to see that they were purchased in the manner which the Government contends in this case. I repeat again, what I say in this respect is not binding upon you, but it is for you to determine whether the Governor did that, or whether he had any connection with the matter at all." (R. 772, 773.)

The evidence was totally inadmissible, not being in the slightest degree similar to the case on trial. This evidence, true, was not objected to. In view of all the circumstances, the admission into evidence of these alleged simi-

lar acts becomes reversible error, although no exception is taken.

This Court has ruled that the court, of its own motion, can direct a new trial if the errors at the trial seriously affect the fairness, integrity or public reputation of judicial proceedings.

In *New York Cent. R. Co.* v. *Johnson,* 279 U. S. 310, the court said (pp. 318, 319):

> "But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy * * * of no importance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice. See *Union Pac. R. Co.* v. *Field* (C. C. A.) 137 F. 14, 15; *Brown* v. *Swineford,* 44 Wis. 282, 293. Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error. *Brasfield* v. *United States,* 272 U. S. 448, 450."

In the case of *Patterson* v. *State of Alabama,* 294 U. S. 600, Chief Justice Hughes said as follows (p. 607):

> "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires."

Is there any doubt, when the trial judge admits evidence of other unrelated acts, a lay jury will consider this inadmissible testimony and be controlled by it?

In view of the fact that the Judge at the outset of the trial (R. 608, 609) ruled that the defendant's other business

transactions, the same ones in fact complained of here, had no relevancy whatsoever to the crime charged, the defendant should have had the protection of the Court, first in having the testimony on the Court's own motion excluded, and secondly in having the prosecuting attorney reprimanded for referring to these other matters in no sense similar in any respect to the subject matter of the trial.

III.

Under the authority of Stapp v. United States, 120 F. (2d) 898, decided by the Circuit Court of Appeals for the Fifth Circuit, after the decision in this case by that same court, the use of the mails, which constitutes the alleged mailing essential to a mail fraud prosecution, having occurred after the consummation of the alleged fraudulent scheme, the petitioner is entitled to a reversal of the conviction. The conflict between the decision in this case and the decision in the Stapp case should be settled by this Court.

Believing firmly that the mailing upon which the second and third counts of the indictment are based falls wholly without not only the letter, but the contemplation of the statute, petitioner begs leave to submit additional authorities on this point.

On June 12, 1941, the Circuit Court of Appeals for the Fifth Circuit rendered its decision in the case of *Stapp* v. *United States, supra,* and it is respectfully submitted that the holding in the *Stapp* case relative to the use of the mails is in direct conflict with that in the instant case. In the *Stapp* case, defendants entered into a scheme to defraud Christian in the purchase of a certain oil lease. The defendant Stapp was represented to be the agent of an oil company authorized to purchase the said lease from the

defendant Rudder for $8,000, but that in truth said lease could be purchased from Rudder for $4,800. The purpose of the scheme was that Christian should buy it from Rudder for $4,800 and that then Stapp would buy it from Christian for $8,000, Christian and Stapp to divide the profit of $3,200.

Christian obtained a letter of credit for $5,000 from the Citizens Bank of Tyler, Texas. He took this letter of credit to the Pauls Valley National Bank, Pauls Valley, Oklahoma, and bought the lease, drawing a check on the Tyler Bank in favor of the Pauls Valley Bank for the $4,800, for which the Pauls Valley Bank issued its cashier's check to Rudder in payment for the lease. Rudder cashed his check with the Pauls Valley Bank and received the cash. Christian's check on the Tyler Bank and the letter of credit was sent by the Pauls Valley Bank to the Liberty National Bank at Oklahoma City, which bank forwarded it to the Fort Worth National Bank for collection. The Fort Worth Bank in the regular course of its business mailed Christian's check and the letter of credit back to the Tyler Bank, and this mailing was the basis of the indictment.

In its opinion the Court stated the general rule:

> "The mailing or causing the letter to be mailed is the crime, not merely devising the fraudulent scheme, and it is vital to the commission of the offense that the letter be in furtherance of the scheme."

The Court further stated:

> "In this case it is apparent the purpose of the scheme to defraud Christian had been completely accomplished when the Pauls Valley Bank accepted his check on the Tyler Bank and the money was paid to Rudder. Christian was then and there defrauded. Up to that point the mails had not been used at all. Christian could not have legally done anything to stop payment of his check and was obligated to reimburse the Pauls

> Valley Bank for cashing it. While the mails were incidentally used, the defendants had no interest whatsoever in that transaction."

Petitioner respectfully urges that the mailing upon which the second and third counts of this indictment are based is even further removed and more remote from the alleged scheme than the mailing in the *Stapp* case, *supra*. It is further respectfully urged that the mailing, made the basis of counts 2 and 3, could not in any sense be considered in furtherance of the alleged scheme.

The record shows that on September 16, 1938 the Louisiana Highway Commission issued its warrant (R. 953) No. 152-9, payable to the order of the Younger Motor Truck Corporation in the sum of $170,158.51.

On the same day the Younger Motor Truck Corporation signed a receipt (R. 955), accepting the said warrant in settlement of its account.

Highway Commission Warrant No. 152-9 (R. 953) was unconditionally endorsed by the Younger Motor Truck Corporation and sold to the banking firm of Newman, Harris & Company, which firm on September 17, 1938 issued its check No. 1950 (R. 957) to the Younger Motor Truck Corporation in the sum of $170,158.51.

In the language of the *Stapp* case, *supra*, if there was any fraud, the Louisiana Highway Commission was "then and there defrauded". To further quote from the *Stapp* case, "up to that point the mails had not been used at all". The Louisiana Highway Commission "could not have legally done anything to stop payment" of its warrant No. 152-9 "and was obligated to reimburse" the holder in due course and for value, namely, Newman, Harris & Company.

If the check of Newman, Harris & Company issued to the Younger Motor Truck Corporation in the sum of

$170,158.51 had been sent through the mails or if the Highway Commission warrant No. 152-9 purchased by Newman, Harris & Company had been sent through the mails, there would still have been no wrongful use of the mails under the statute, according to the *Stapp* case, *supra*, but neither the said check nor the said warrant were in any way involved in the mailing. Therefore, the mailing charged in counts 2 and 3 of this indictment is even more remote from the execution of the alleged scheme.

The additional "distance" between these mailings and the alleged scheme to defraud is clearly shown by the record. The Younger Motor Truck Corporation deposited the check of Newman, Harris & Company in its bank account in the Guaranty Bank & Trust Company of Alexandria, Louisiana, on September 19, 1938 (R. 958). No subsequent mailing of this check by the bank is either charged or proven. This is another significant milestone in showing the remoteness of the mailing.

On September 17, 1938, the Younger Motor Truck Corporation drew a draft (R. 971) on the Louisiana National Bank of Baton Rouge to the order of James Thomas in the sum of $22,000, in payment of his commission on the sale of the trucks.

Thomas endorsed and deposited this draft (R. 972) in his bank account in the City National Bank of Baton Rouge. The ledger sheet of Thomas' account in the City National Bank (R. 973) shows a balance of only $2,267.30 prior to the depositing of the $22,000 draft. Thomas immediately drew upon said account in the sums of $2,410.36 and $10,020.83 (R. 973). Up to this point "the mails had not been used at all". Payment could not have been stopped on the draft for $22,000 issued by the Younger Motor Truck Corporation to Thomas, and the Louisiana Highway Commission, if there was fraud, had long since been defrauded when its negotiable warrant had been purchased by New-

man, Harris & Company, an innocent holder in due course and for value.

The City National Bank of Baton Rouge forwarded the $22,000 draft to the Commercial National Bank of Shreveport, Louisiana, along with other items for collection (R. 272-273). Up to this distant point no use of the mails in furtherance of the alleged scheme was either charged or proven. At this point the alleged scheme to defraud had long been lost sight of in the dust of a lengthy and tortuous trail.

Thereafter, the Commercial National Bank of Shreveport "sent" the said draft to the Rapides Bank & Trust Company of Alexandria, Louisiana, and this constituted the alleged mailing upon which counts 2 and 3 of this indictment are based and founded.

The record further shows that all alleged payments by Thomas to petitioner (R. 701) were made prior to the receipt by Thomas of the said draft.

If the holding in the *Stapp* case, *supra,* be correct—and we respectfully submit that it is—then certainly the alleged mailing in counts 2 and 3 of this indictment, being much more remote, can certainly not be said to have been "in furtherance of the scheme". If the holding in the *Stapp* case be not sound, we then respectfully submit that there is such a divergence in the opinions of the same Court, rendered at approximately the same time, as to clearly invoke the supervisory powers of this Court.

To summarize—It is our contention that, when the negotiable warrant No. 152-9 of the Louisiana Highway Commission was sold by the Younger Motor Truck Corporation to Newman, Harris & Company for value, if there was any fraud the Highway Commission was "then and there defrauded". It could not legally do anything to stop payment on said warrant. Newman, Harris & Company be-

came a holder in due course for value and all of the legal defenses of such a position immediately surrounded them.

But there is an additional step even beyond this. On September 16, 1938, the day upon which it purchased the warrant from the Truck Corporation, Newman, Harris & Company sold the warrant to a bank. This is proved (R. 977) by the letter of confirmation to Newman, Harris & Company reading as follows:

> "This will confirm our purchase from you today of 170,158.51 State of Louisiana 4% Highway Warrants due December 31, 1938, at 100 flat plus commission of $1.00 per thousand. We have today wired the National Bank of Commerce, New Orleans, to accept these warrants on September 17 and pay you $170,328.67 upon presentation."

On the same page of the Record (977) is the letter from the National Bank of Commerce in New Orleans to the Commercial National Bank in Shreveport, authorizing payment for the warrant.

All of this establishes beyond any doubt whatsoever that long prior to the alleged mailing the Highway Commission warrant, passing through the hands of various individuals and banks who were innocent third holders in due course and for value, irretrievably passed beyond any power of the Highway Commission to stop payment or to in any way legally deny its obligation. By whatever view may be taken, there can be no doubt that the object of the alleged scheme had been accomplished and that, in view of the many successive steps which followed, the alleged mailing of the draft could not have been "in furtherance of the scheme."

The law is clear that the object of the fraudulent scheme is fully accomplished, not only when the victim has actually parted with his money, but when his check or other evidence

of indebtedness has passed into the hands of innocent third persons in due course or for value received or has reached any position where payment thereof may not legally be stopped.

Stapp v. *United States, supra;*
Meyer v. *United States,* 220 Fed. 800, 805;
Mitchell v. *United States,* 118 F. (2d) 653;
Dyhre v. *Hudspeth,* 106 F. (2d) 286, 288;
McNear v. *United States,* 60 F. (2d) 861, 863.

That Warrant No. 152-9 of the Louisiana Highway Commission had passed beyond the legal ability of the Commission to stop payment or deny the obligation, is clearly shown by the following from Dart's Louisiana General Statutes, Vol. 1, § 846:

> "846. TITLE AND RIGHTS OF HOLDER IN DUE COURSE.—A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon. (Acts 1904, No. 64, § 57.)"

Further proof that, if the Highway Commission was defrauded, the scheme was completed and fulfilled when Newman, Harris & Company purchased the warrant, is evidenced by the fact that, had the Younger Motor Truck Corporation deposited the Newman, Harris check and thereafter paid Thomas his $22,000 commission in cash, instead of by the draft in question, the Highway Commission would have been in no better position than that in which it found itself because the Truck Company chose to pay Thomas his commission by the draft.

The Government contends that the issuance of the draft by the Truck Company to Thomas was in payment of the spoils

or fruits of the alleged scheme to defraud. The authorities above quoted and numerous other authorities make it extremely doubtful if use of the mails in payment of the fruits of the scheme constitute such use "in furtherance of the scheme" as to come within the statute, but argument on this point is unnecessary because we point out in conclusion that Younger, because he was concededly a party to the alleged scheme to defraud, acted on behalf of the other parties in whatever actions he may have taken relative to the consummation of the alleged scheme. We, therefore, point out that, when Younger or the Younger Motor Truck Corporation accepted from Newman, Harris & Company their check in the sum of $170,158.51, he acted for and on behalf of his alleged co-schemers and that the said check, which he accepted for the full amount, included the $22,000 commission which he later paid to Thomas. Therefore, the fruits, so-called, of the alleged scheme were represented by the check of Newman, Harris & Company, which was in no way involved, allegedly or otherwise, in the use of the mails, so there can be no question of a doubt but that the alleged scheme was fully terminated and completed in all of its objects when one of the alleged co-conspirators accepted the check, which included, among other things, the alleged illegal profits.

When Younger, an alleged co-conspirator, had in his possession the fruits of the alleged scheme to defraud, he held them for his alleged co-schemers, as well as for himself. Therefore, the subsequent payment by Younger to Thomas was in no way whatsoever connected with the alleged scheme to defraud and the long journey taken by the $22,000 draft, which culminated in the alleged mailing, which was never proved, by a third bank to a fourth bank for collection, was about as remote as any circumstance could be conceived with reference to the mailing "in furtherance of the scheme."

IV.

The draft of $22,000 in favor of Thomas, drawn by the Younger Motor Truck Corporation, representing a part of the profits under the alleged scheme to defraud, having been deposited in the City National Bank of Baton Rouge, and thereafter sent by that bank to a third bank and then allegedly mailed by this third bank to still another bank, not named in the draft, such incidental use of the mails is not "caused" by the defendant nor "according to the direction thereon" and does not come within the mail fraud statute.

The draft (R. 971), made the basis of counts 2 and 3 in the indictment, was addressed to the Guaranty Bank & Trust Company, Alexandria, Louisiana. This draft was deposited (R. 972) in the City National Bank of Baton Rouge by Thomas. The City National Bank of Baton Rouge forwarded the draft, along with other items for collection (R. 272, 273) to the Commercial National Bank of Shreveport. The Commercial National Bank of Shreveport allegedly mailed this draft to the Rapides Bank & Trust Company of Alexandria, Louisiana, and this alleged mailing is the basis of counts 2 and 3 of the indictment.

The City National Bank of Baton Rouge was in no sense the agent of Thomas for the purpose of collecting the amount of the draft.

Burton v. *United States*, 196 U. S. 283;
City of Douglas v. *Federal Reserve Bank*, 271 U. S. 489;
Daykin v. *Bayly*, 290 U. S. 143.

Certainly, the subsequent alleged mailing of the draft by the Commercial Bank of Shreveport to the Rapides Bank & Trust Company could not reasonably have been

foreseen by Thomas and, therefore, not "caused" * by him. Furthermore, this alleged mailing, made the basis of the counts, was not "according to the direction thereon" *, as the draft was drawn upon and addressed to, not the Rapides Bank & Trust Company, but the Guaranty Bank & Trust Company of Alexandria, Louisiana.

Thomas could not possibly have foreseen or in any way anticipated the mailing by a bank in a distant city, which entered in no wise into the transaction, to still another bank, upon which the draft was not drawn and to which it was not addressed.

To quote the *Stapp* case, *supra*:

> "While the mails were incidentally used, the defendants had no interest whatsover in that transaction."

As pointed out above in Point III, the alleged fraudulent scheme was entirely completed and consummated when Newman, Harris & Company purchased the Highway Commission warrant for value and gave its check therefor to Younger. Neither the Highway Commission warrant nor the Newman, Harris check are involved in the mailing and counts 2 and 3 must fall because, first, the alleged scheme was fully consummated; second, the alleged use of the mails was not "in furtherance of the scheme"; third, the incidental mailing was not "caused" by Thomas; and fourth, the alleged mailing was not "according to the direction thereon".

Conclusion.

Petitioner respectfully urges upon this Court no more and no less than the privilege of being heard and, in presenting the above additional reasons in support of his application for a writ of certiorari, does not abandon, but, on the contrary, reiterates and reaffirms all of the

---

* See language of 18 U. S. Code § 338.

matters raised in his original petition for a writ of certiorari.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, that the order denying certiorari be vacated and certiorari granted, and that the case be assigned for argument.

Respectfully submitted,

MARTIN W. LITTLETON,
OTTO C. SOMMERICH,
Counsel for Petitioner.

Certificate of Counsel.

We, Martin W. Littleton, Jr. and Otto C. Sommerich, counsel for the above-named Richard W. Leche, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

MARTIN W. LITTLETON,
OTTO C. SOMMERICH,
Counsel for Petitioner.